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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

HILL-BEHAN LUMBER COMPANY, a Corporation,
Petitioner,

v.

STATE HIGHWAY COMMISSION OF MISSOURI,
a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

and

BRIEF IN SUPPORT THEREOF.

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Petitioner,

v.

STATE HIGHWAY COMMISSION OF MISSOURI,
a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Missouri.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Hill-Behan Lumber Company, a Missouri corporation, respectfully petitions for a writ of certiorari to review a final decision of the Supreme Court of the State of Missouri rendered in the above-entitled cause on February 14, 1941, not yet officially reported, but appearing in 148 S. W. (2nd) 499. Motion for Rehearing and Motion to Transfer to Banc were denied on March 13, 1941 (R. 315). This decision affirmed a decree entered by the Circuit Court of St.

Louis County, Missouri, sustaining the motion for new trial of defendant, State Highway Commission of Missouri, after the plaintiff, Hill-Behan Lumber Company, had obtained a verdict for damages in the sum of $42,500.00 on account of damage to its property in St. Louis County, Missouri, occasioned by the construction of a viaduct to eliminate a grade crossing. The suit was originally filed in Cole County, Missouri (R. 1), the court designated by the Missouri Statutes (Sec. 8750, R. S. 1939) as the venue of all suits brought against the State Highway Commission, and was sent to St. Louis County upon motion by defendant for a change of venue (R. 2).

SUMMARY STATEMENT OF MATTER INVOLVED.

In 1916 (R. 22) the predecessor of petitioner, which was incorporated in 1923 (R. 40), acquired a lumberyard site located in the metropolitan area of the City of St. Louis, Missouri (R. 70, 71, 76), but about 1,500 feet west of the city limits (R. 77) at the junction of Page Boulevard,[1] a well traveled 100 foot wide thoroughfare, and the Wabash Railroad tracks (R. 71, 72, 74). About 1932, U. S. 40, the main cross-state highway between St. Louis and Kansas City, was rerouted along Page Boulevard, and in 1935, following appropriate legal provisions authorizing same (R. 286-291), the State Highway Commission of Missouri commenced the construction of a viaduct across the Wabash tracks (R. 75, 76), and thereafter completed the same (R. 32, 33).

Access to petitioner's property from said viaduct is by means of narrow ramps with sharp turns requiring back and forth maneuvering of the lengthy trucks used by the petitioner and by customers who call at petitioner's lumberyard with their own trucks (R. 32-36), 104). Also a serious traffic hazard was created (R. 104), causing a number

1 Gratuitously dedicated in 1870 as a public highway (R. 277-281).

of accidents to vehicles which had to break through two lanes of traffic to reach the ramps (R. 34-36, 186). For the above reasons the petitioner suffered serious damages to its property as a business location (R. 32, 75). Plaintiff's witnesses placed the damage to petitioner's property at $100,000.00 or more (R. 74, 87) and the jury returned a verdict of $42,500.00 (R. 13).

Article II, Sec. 21, of the Constitution of Missouri, provides:

> "**Private property for public use—compensation.**—That private property shall not be taken or **damaged** for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad tracks without consent of the owner thereof shall remain in such owner, subject to the use for which it is taken." (Emphasis ours.)

The opinion of the Supreme Court of Missouri recognizes that line of cases in Missouri under which damages are allowed to abutting property owners in municipalities on account of change of grade, whether due to a viaduct or otherwise,[1] but holds that abutting property owners who are outside the boundaries of municipalities are not likewise entitled to damages,[2] but that any damages which they may suffer to their property must be considered "damnum absque injuria."[3] In attempting to justify this

1 148 S. W. (2d), l. c. 500.

2 148 S. W. (2d), l. c. 500-501.

3 148 S. W. (2d), l. c. 502.

discrimination between property owners on one side or the other of the city boundary, the opinion, following the case of *Zoll v. St. Louis County,* 343 Mo. 1031, 124 S. W. (2d) 1168, decided in December, 1938, after the viaduct here involved was constructed and the present suit was pending, asserts that a municipality, in changing the grade of a street, "is acting in a private and proprietary capacity and for its own private benefit."[4] It then points out that the State Highway Commission is acting in a public capacity.[5]

Before bringing the present suit, petitioner filed an injunction suit against the construction company which was constructing the viaduct, and against the members of the State Highway Commission. Said prior case on appeal to the Supreme Court of Missouri is reported as *Hill-Behan Lumber Co. v. Skrainka Construction Co. et al.,* 341 Mo. 156, 106 S. W. (2d) 483, in which the Supreme Court of Missouri denied the injunction, holding that petitioner had an adequate remedy at law for damages. The opinion in the present suit construes the opinion in the prior suit as not holding that the petitioner was entitled to recover damages on the theory that that question was not before the Court, but that the effect of the holding in the prior case was that if the petitioner was entitled to recover any damages it had an adequate remedy at law.[6] However, the opinion contains statements which seem to be contradictory to the above holding, as the opinion construes Sec. 8102, R. S. Mo. 1929 (Sec. 8750, R. S. Mo. 1939), which provides that the State Highway Commission "may sue and be sued" as meaning that there must be a specific statute authorizing the identical character of suit.[7] There is no other express authority for the State Highway Commission to be

4 148 S. W. (2d), l. c. 500-501.

5 148 S. W. (2d), l. c. 501-502.

6 148 S. W. (2d), l. c. 502.

7 148 S. W. (2d), l. c. 500.

sued than said section, and so, unless the Supreme Court of Missouri had in mind liability as distinguished from immunity from suit, the effect of the holding would be that no action of any sort can be filed against the State Highway Commission, although there are many cases, which are collected in the case of *Bush v. State Highway Commission of Missouri,* 329 Mo. 843, 46 S. W. (2nd) 854, recognizing that the State Highway Commission is generally subject to suit, but that it cannot be held liable in tort actions.

BASIS OF THE JURISDICTION OF THIS COURT.

Jurisdiction is claimed under Section 344, Title 28, U. S. C. A. In petitioner's first amended petition, the petition upon which the case was tried in the trial court, petitioner alleged that his private property had been taken and damaged for public use by the defendant; that defendant had failed and refused to pay just compensation, or any compensation therefor; that there was a violation of the aforesaid Section 21, Article II, of the Constitution of Missouri, and a violation of the Fourteenth Amendment of the Constitution of the United States providing that no person shall be deprived of life, liberty or property without due process of law, and that private property shall not be taken for public use without just compensation, and that no State shall deny to any person within its jurisdiction the equal protection of the laws (R. 9). The Missouri practice for appeal requires a statutory form of an affidavit for appeal (Sec. 1186, R. S. Mo. 1939). Petitioner's brief in the Supreme Court of Missouri, while not a part of this record, raised issues under the aforesaid Missouri constitutional provision and under the Fourteenth Amendment of the Constitution of the United States, both on the basis of due process of law and equal protection of the laws, as set forth in more detail in the Motion to Transfer

to transfer to Court en Banc, hereinafter mentioned (R. 304). After the opinion of the Supreme Court of Missouri was rendered, petitioner filed a Motion for Rehearing, raising both the due process and equal protection of the laws clauses of Section 1 of the Fourteenth Amendment, in connection with the suability of the State Highway Commission and the contention that an action to recover damages is not maintainable, and against the theory of immunity from suit of said Commission, as is more fully set forth in paragraphs 1, 4, 5 and 10 of said Motion for Rehearing (R. 301). Petitioner also filed a Motion to Transfer to Court en Banc, pointing out the federal constitutional questions under the due process and equal protection of the laws clauses of Section 1 of said Fourteenth Amendment raised in the brief, asserting that said federal questions were decided adversely to the petitioner in said opinion, and that said opinion was in conflict with prior holdings of the Court en banc, and denied equal protection of the laws, as more fully set forth in said motion (R. 304-306).

THE QUESTIONS PRESENTED.

(1) Does the opinion of the Supreme Court of Missouri deny equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States by discriminating between property holders in municipalities and property holders elsewhere in the State, arbitrarily granting damages to one class and denying damages to another class, where there is no reasonable basis for such discrimination?

(2) Should the opinion of the Supreme Court of Missouri, in view of its conflicting statements, be construed as granting immunity from suit to the State Highway Commission of Missouri, as distinguished from attempting to deny liability?

(3) If construed as granting immunity, does it violate the provision of the Fourteenth Amendment of the Constitution of the United States requiring that a State grant equal protection of the laws to its citizens?

(4) Does said opinion violate the due process clause of the Fourteenth Amendment?

REASONS WHY A WRIT OF CERTIORARI SHOULD ISSUE.

Many States have constitutional provisions which contain the words "or damaged," or their equivalent, thus extending the provisions of the Fifth and Fourteenth Amendments dealing with the taking of private property for public purposes. The decisions construing such constitutional provisions have permitted damages of the character in question.[1] The highway systems of the various States are a development of recent years and the building of viaducts to eliminate grade crossings has become an important feature of the development of traffic regulation. The large number of occasions where viaducts may cause serious damage to what is essentially city property, though beyond the borders of the city, render of national importance the question of whether a State can constitutionally discriminate between its citizens in permitting damages where grade crossings are within cities, but refusing damages when they are in a metropolitan area just outside the city border. The question is of great importance, not only to property owners in districts outside of city limits, but to the various State Highway Commissions, or similar bodies. The granting of the writ of certiorari and the decision of

1 *City of Chicago v. Taylor*, 125 U. S. 161, 31 L. Ed. 638; *Campbell v. Arkansas State Highway Commission*, 183 Ark. 780, 38 S. W. (2d) 753; *Perkerson v. State Highway Board*, 56 Ga. App. 316, 192 S. E. 475; *Pelt v. La. State Live Stock Sanitary Board*, 178 So. 644 (La. App.—not yet officially reported); *Kentucky State Park Commission v. Wilder*, 260 Ky. 190, 84 S. W. (2d) 38.

this Court on the subject would definitely settle the rights of thousands of property owners whose property may be thus damaged.

Petitioners further contend that the decision of the Supreme Court of Missouri is in conflict with at least the following decisions of this Court: *Liggett Co. v. Lee*, 288 U. S. 517, 77 L. Ed. 929, and *Hayes v. Missouri*, 120 U. S. 68, 30 L. Ed. 578, showing when discrimination against localities does or does not deny equal protection and the principles to be applied; *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239, 76 L. Ed. 265, and *Cumberland Coal Company v. Board of Revision*, 284 U. S. 23, 76 L. Ed. 146, holding that arbitrary application of a law that is fair on its face, including such action by the State Supreme Court, denies equal protection of the laws; *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, 83 L. Ed. 208, holding that where a State sees fit to grant a right which it is not required to grant, it cannot arbitrarily discriminate between citizens, and also permitting redress through a suit which would be considered as the equivalent of an improper action against the State where the Fourteenth Amendment is not involved, the latter proposition being also held by *Iowa-Des Moines National Bank v. Bennett*, supra; *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 55 L. Ed. 890, holding that an attempt to grant immunity from any relief from the action of a State corporation in damaging property would amount to a waiver of immunity against suit; *Prout v. Starr*, 188 U. S. 537, 47 L. Ed. 584, holding that enforcement of the Fourteenth Amendment is superior to State immunity from suit; *Reconstruction Finance Corporation v. J. G. Menihan Corporation*, 85 L. Ed., Adv. Op. 458, holding that the words "sue and be sued" waive immunity to suit.

PRAYER.

For the foregoing reasons, which are developed in further detail in the accompanying brief, your petitioner prays that a writ of certiorari issue out of this Court to the Supreme Court of the State of Missouri commanding said Court to certify and send to this Court on a day to be determined, a full and complete transcript of the record of all of the proceedings of such Court had in this cause, to the end that this cause may be reviewed and determined by this Court; that the final order and decree of the Supreme Court of Missouri be reversed, and that the petitioner be granted such other and further relief as is proper.

HILL-BEHAN LUMBER COMPANY,
a corporation,
Petitioner,

By JACOB M. LASHLY,
ARTHUR V. LASHLY,
FRANK E. ATWOOD,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

There was no opinion in the trial court. The opinion of the Supreme Court of Missouri is reported in 148 S. W. (2d) 499, and became final on March 13, 1941, when a Motion for Rehearing and a Motion to Transfer to Banc were denied.

JURISDICTION.

Reference is made to the jurisdictional statement contained in the petition in this Court.

STAY OF MANDATE.

The Supreme Court of Missouri has entered an order staying the Mandate during the pendency of the proceedings in this Court.

STATEMENT OF CASE.

Reference is made to the Summary Statement of Matter Involved, contained in the petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Section 21, Article II, of the Constitution of Missouri provides as follows:

> "**Private property for public use—compensation.**—That private property shall not be taken **or damaged** for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the

proprietary rights of the owner therein divested. The fee of land taken for railroad tracks without consent of the owner thereof shall remain in such owner, subject to the use for which it is taken." (Emphasis ours.)

Section 8750, R. S. Mo. 1939 (being the same as Section 8102, R. S. Mo. 1929, referred to in the opinion), so far as material, provides as follows:

"* * * The commission shall have a seal bearing the inscription 'State highway commission of Missouri,' which shall be in the custody of the secretary, and shall be affixed to all official documents of the commission, or of the engineer, and to such other instruments as the commission shall direct. The courts of this state shall take judicial notice of said seal. The commission may sue and be sued in its official name, and for the purpose of suit and other legal proceedings, service may be had on the secretary. * * *"

This section is part of Chapter 46, Article 13, R. S. Mo. 1939, entitled "State Highway Department—State Highway System." This is the only section in said Article, or elsewhere in the Missouri statutes, which deals with suits against the State Highway Commission of Missouri.

The last sentence of Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

SPECIFICATIONS OF ERRORS TO BE URGED.

I. The opinion and decree of the Supreme Court of Missouri denies equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States by discriminating between property holders in municipalities and property holders elsewhere in the State, arbitrarily granting damages for change in grade of a highway to one class and denying such damages to another class, where there is no reasonable basis for such discrimination.

II. If the opinion and decree of the Supreme Court of Missouri can properly be construed as granting immunity from suit to the State Highway Commission of Missouri, as distinguished from attempting to deny liability for the damage to petitioner's property, it is a violation of the Constitution of the United States prohibiting a State from denying its citizens the equal protection of its laws.

III. The opinion and decree of the Supreme Court of Missouri deprives the petitioner of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

SUMMARY OF ARGUMENT.

The same as the above Specifications of Error.

ARGUMENT.

I. The opinion and decree of the Supreme Court of Missouri denies equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States by discriminating between property holders in municipalities and property holders elsewhere in the State, arbitrarily granting damages for change in grade of a highway to one class and denying such damages to another class, where there is no reasonable basis for such discrimination.

The Missouri constitutional provision was amended in 1875 by adding the words "or damaged," which are not contained in the Fifth Amendment or in most early State constitutional provisions of like nature. It was first interpreted in *Householder v. The City of Kansas*, 83 Mo. 488 (1885), as granting a cause of action for damages on account of change of grade, the cases prior to the amendment having held such damages to be damnum absque injuria. There was no city charter or statutory provision for its enforcement, but it was held to be self-enforcing. The authority of this case was recognized by a long line of decisions set forth in *Tremayne v. City of St. Louis*, 320 Mo. 120, 6 S. W. (2d) 935, although the *Tremayne* and other cases hold that where, subsequently, city charters have provided a procedure, this procedure must be followed as being a statutory method for further carrying out the terms of the constitutional provision.

This Court gave a like interpretation to a similar amendment of the Illinois Constitution. *City of Chicago v. Taylor*, 125 U. S. 161, 31 L. Ed. 638.

In the present case,[1] following *Zoll v. St. Louis County*, 343 Mo. 1031, 124 S. W. (2d) 1168, decided during the pendency of the present case,[2] the Supreme Court of Missouri held: "* * * but as we pointed out in the *Zoll* case (124 S. W. [2d], l. c. 1172), such (municipality) cases are not authority for the maintenance of such case as here **because the municipality is acting in a private and proprietary capacity and for its own private benefit.**" (Emphasis ours.) This statement is palpably unsound. A municipality does not act in a private capacity when it damages property in the change or improvement of a public highway. This is shown by the citation from 13 R. C. L., p. 79, Sec. 70, cited in the opinion itself. It is there stated that a city acts, in such cases, in a governmental and not in a private capacity.[3] The statement in the opinion is not conclusive upon this Court.

This Court has many times held that when the Fourteenth Amendment is involved, it draws its own conclusions, and need not follow the reasoning of the decision of the State Supreme Court. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *Cumberland Coal Co. v. Board of Revision*, 284 U. S. 23, 76 L. Ed. 147; *Iowa-Des Moines National Bank v. Bennett*, 284 U. S. 239, 76 L. Ed. 265. The latter two cases involved the arbitrary application of tax laws fair on their face, and the decision of the Supreme Court of the State is treated as part of the arbitrary action. The *Bennett* case especially emphasizes the action

1 It would be inferred from the opinion that *State ex rel. State Highway Commission v. Bailey*, 234 Mo. App. 168, 115 S. W. (2d) 17, is to the same effect as the present case, but when the full paragraph is read from which the quotation in the opinion is taken, it is apparent that the holding was that damages could not be recovered on account of improvements erected on an unused part of the highway right of way, when the Highway Commission later decided to use its entire right of way and widen the same. This decision was also during the pendency of the present case.

2 The *Zoll* case also violates the Fourteenth Amendment, but certiorari proceedings were not instituted in this Court.

3 148 S. W. (2d), l. c. 501-502.

taken by the Supreme Court of the State. Probably the latest holding is *Smith v. Texas*, 85 L. Ed., Adv. Opin. 106 (Nov., 1940), where it is stated:

> "* * * The fact that the written words of a State's laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not merely promised."

So here the Missouri constitutional provision as to damaging property for public use contains not a hint of any discrimination, but that all who are damaged must be compensated. The opinion of the Supreme Court of Missouri arbitrarily attempts to deprive petitioner of its compensation because its property is located 1,500 feet beyond the city limits on Page Boulevard (R. 77).

Discriminations as to locality may be made when they are reasonable, but not otherwise. In *Liggett Co. v. Lee*, 288 U. S. 517, 77 L. Ed. 929, a chain store tax rate increase when the chain operated in more than one county was held to have no reasonable basis for such classification. This Court states:

> "* * * but an increase in the levy not only on a new store but on all the old stores, **consequent upon the mere physical fact that the new one lies a few feet over a county line**, finds no foundation in reason or in any fact of business experience. * * *" (Emphasis ours.)

So here the property is just as much damaged for public use as though it were 1,500 feet further east in the same metropolitan area. It is true that three justices dissented, but their dissent is based on a special theory of taxation as applied to chain stores, which does nothing to weaken the reasoning of the majority opinion, as applied to the

Missouri constitutional provision which promises compensation to everybody whose property is damaged for public use, regardless of where it is located.

While most cases arise under taxation or restrictive laws, the Fourteenth Amendment does not purport to exempt laws that constitute a grant rather than a restriction. For example, a State has the right to offer to its citizens any degree of free education that it sees fit. But when it makes this voluntary offer, then it can be compelled by suit to offer the same educational rights to all of its citizens, without discrimination. *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, 83 L. Ed. 208.

For the above reasons the opinion and decree of the Supreme Court of Missouri denies equal protection of the laws to the extent that it attempts to nullify the Missouri constitutional provision as to the petitioner, a holder of property outside the boundaries of any municipality.

II. **If the opinion and decree of the Supreme Court of Missouri can properly be construed as granting immunity from suit to the State Highway Commission of Missouri, as distinguished from attempting to deny liability for the damage to petitioner's property, it is a violation of the Constitution of the United States prohibiting a State from denying the equal protection of its laws.**

In the first half of the opinion,[1] in the midst of a general discussion which seems to have more to do with liability for damages as distinguished from immunity from suit, the Court construes Section 8750, R. S. Mo. 1939 (referred to in the opinion as Sec. 8102, R. S. Mo. 1929), providing that the State Highway Commission may "sue and be sued," to mean that there must be some special statute particularly involving the identical character of suit which may be at issue. This section is a part of Chapter 46,

1 148 S. W. (2d), l. c. 500.

Article 13, R. S. Mo. 1939, entitled "State Highway Department—State Highway System," and nowhere in this Article, or elsewhere in the Missouri statutes, is there any provision other than said Section 8750 authorizing suit against the State Highway Commission. As we read the opinion, if the Supreme Court of Missouri merely meant that the State Highway Commission has immunity from suit (as distinguished from liability in an action) in spite of the express provision that it may "sue and be sued," then the effect of the opinion would be not only to delete from the statute the words "and be sued" but to overrule a long line of cases set forth in *Bush v. State Highway Commission of Missouri*, 329 Mo. 843, 46 S. W. (2d) 854, which case sharply distinguishes between immunity from an action as distinguished from liability.[1] We do not believe that it should be assumed that the Supreme Court of Missouri intended any such extreme holding, if there is anything else in the opinion which will justify an interpretation in accordance with the words of the statute, and the established law of the State of Missouri pertaining to the nonimmunity from suit of the State Highway Commission. A later portion of the opinion[2] refers to the decision in *Hill-Behan Lumber Company v. Skrainka Construction Co.*, 341 Mo. 156, 106 S. W. (2d) 483, which had been previously brought against the contracting company and the members of the State Highway Commission to enjoin the building of the viaduct, in which the Court in the instant case states: "It was held that plaintiff was not entitled to injunctive relief because there was adequate remedy at law for any damages which plaintiff 'may have sustained.'"[2] The Court, in the opinion in the instant case, then states: "The

1 The *Bush* case announced the doctrine of substantive law that the State Highway Commission was not liable for the negligent torts of its agents, while fully recognizing the distinction between immunity from an action and liability. It was not a divisional opinion, but is by the entire Court en banc.

2 148 S. W. (2d), l. c. 502.

question of whether the plaintiff was **entitled** to recover damages was not before the court in the injunction suit, and the **effect** of the opinion in that case is no more than that if plaintiff was entitled to recover damages it had an adequate remedy at law."[2] (Emphasis by the Court.) It seems apparent that the Court intended to treat the decision in the *Skrainka* case as being either res adjudicata, or at least as not being overruled. This particularly appears from the emphasis used by the opinion in referring to said case as not involving the question of liability for damages but merely holding that the plaintiff had an adequate remedy at law for damages, if any. We do not see how this treatment of the *Skrainka* case could be reconciled with a construction of the opinion in the present case to the effect that the petitioner not only did not have an adequate remedy at law, but has no remedy whatsoever, assuming that it sustained compensable damages.

However, in view of conflicting statements in the opinion, we will assume for the purpose of this argument the Supreme Court of Missouri intended to hold that, irrespective of whether or not there was liability for the damages sustained, the State Highway Commission of Missouri has been granted immunity from suit.

We wish to call the attention of this Court to the very recent case of *Reconstruction Finance Corporation v. J. G. Menihan Company,* 85 L. Ed., Adv. Op. 458 (Feb. 3, 1941), where this Court followed a series of earlier cases dealing with federal corporations, in holding that it was the intent of Congress that the Reconstruction Finance Corporation, and other such federal governmental agencies, should have no privilege whatsoever as to immunity from suit. In this case, and in the case of *Federal Housing Administration v. Burr,* 309 U. S. 242, 84 L. Ed. 724, and *Keifer & Keifer v. Reconstruction Finance Corporation,* 306 U. S. 381, 83

2 148 S. W. (2d), l. c. 502.

L. Ed. 784, this Court holds that the words "sue and be sued" (which appear in Sec. 8750, R. S. Mo. 1939) mean what they say and render such governmental agencies generally subject to suit. These decisions recognize the "present climate of opinion," which has brought "governmental immunity from suit into disfavor." While these cases recognize that the Congress had the right to grant its agencies immunity from suit, it should be borne in mind that the Fourteenth Amendment places no restrictions upon the Congress, which is able to grant immunity from suit under conditions where a State could not do so without violating the Fourteenth Amendment. These cases dealing with governmental corporations, which are referred to as agencies, are further significant because the Supreme Court of Missouri in *State ex rel. State Highway Commission of Missouri v. Bates*, 317 Mo. 696, 296 S. W. 418, states that the State Highway Commission "is a legal entity with powers of a corporation," developing the subject at considerable length. We do not interpret the present opinion as overruling the *Bates* case.

Most cases dealing with State immunity arise under the Eleventh Amendment, which is not applicable here. It has been definitely settled that proceedings in the Supreme Court of the United States to reverse alleged unconstitutional opinions and decrees of the Supreme Court of the State are not considered as suits against the State within the meaning of the Eleventh Amendment, even though the writ may be issued against the State. We do not believe that any doubt has been raised as to this question since the case of *Hans v. Louisiana*, 134 U. S. 1, 33 L. Ed. 842, cited with approval in *Monaco v. Mississippi*, 292 U. S. 313, 78 L. Ed. 1282. Where no provision of the Constitution of the United States is involved, it has been uniformly held that a State has the sovereign right to repudiate its bonds or other obligations, and that this right cannot be evaded by a suit against a State officer or agency which would

have the effect of compelling the State to carry out its obligations. On the other hand, if State officers or agencies purport to act under void laws, or otherwise take void action, they may be enjoined or otherwise held liable to suit. For a good discussion of when a suit nominally brought against an individual or agency is really in the nature of a suit against the State, we refer the Court to the case of *In the Matter of the State of New York,* 256 U. S. 490, 65 L. Ed. 1057.

When the Fourteenth Amendment was enacted, the result was that each State surrendered its sovereign immunity from suit to the extent that such immunity would be inconsistent with the enforcement of the Fourteenth Amendment against the State. In *Missouri ex rel. Gaines v. Canada,* supra, the State of Missouri had elected to offer free legal education to its citizens. The State passed certain statutes which, as interpreted by the Supreme Court of Missouri, were held by this Court to discriminate against negroes in the matter of legal education. The suit was a mandamus suit filed against the curators of the University of Missouri, a state agency, seeking to compel them to enroll the relator in the Law School of the University of Missouri. The opinion of this Court reversed the Supreme Court of Missouri and required either that the relator be allowed an education at the expense of the State of Missouri in the Law School of the University of Missouri, or that law school facilities for him be established by the State of Missouri in Lincoln University, the State University for negroes. Under the rule announced in the case of *In the Matter of the State of New York,* supra, and cases cited therein, it is clear that where the action against the officer or agency seeks something at the expense of the State, or to indirectly enforce a State obligation, the suit is in nature of a suit against the State. Thus it is apparent that where it is necessary in order that a State may be

compelled to grant the equal protection of the laws to its citizens, that a suit be filed against the State or its officer or agency which would ordinarily be considered in the nature of a suit against the State, the ordinary sovereign right of immunity from suit cannot prevent such a suit where required to carry out the provisions of the Fourteenth Amendment.

We believe that the case of *Iowa-Des Moines National Bank v. Bennett,* supra, is very much in point, where the opinion of Justice Brandeis permitted a mandamus action to compel the refund of money which had been unconstitutionally exacted under a law which, as in the case of the Missouri constitutional provision, was fair on its face. The opinion of this Court held that the State was seeking to retain the money, and the opinion of the Supreme Court of Iowa was attempting to justify an unconstitutional act. This Court stated:

> "* * * Here, the exaction complained of was made by the treasurer in the name of and for the State, in the course of performing his regular duties; the money is retained by the State; and the judicial power of the State has been exerted in justifying the retention. * * *"

Both of the above cases, and many other cases, refer to the equal protection clause of the Fourteenth Amendment as being directed against State action, rather than individual action. We again refer the Court to the recent case of *Smith v. Texas,* supra, from which we have quoted under the preceding point.

In the *Skrainka* case, supra, the State of Missouri upheld the legality of the action of the State Highway Commission. The decision in that case was clearly not in violation of the Fourteenth Amendment, as the State, in granting the constitutional right that private property shall not

be damaged for public purposes without just compensation, can surely specify that compensation must be had by way of an action for damages. By the decision in the *Skrainka* case the Supreme Court of Missouri conclusively created the situation where the only manner in which the equal protection of the laws could be afforded was through a suit for damages against the State Highway Commission, which is the precise character of the suit here involved. The State cannot arbitrarily nullify its constitutional grant of the right to compensation for property damaged through public use by granting such right to residents of municipalities and denying such right to the petitioner who was unfortunate enough to be located on Page Boulevard just 1,500 feet west of the invisible city boundary. It cannot, by arbitrarily denying petitioner access to its courts after it has already determined that petitioner has an adequate remedy at law for damages, discriminate between the petitioner and residents of municipalities whom the Supreme Court of Missouri has in an unbroken line of decisions, recognized though not cited in the present opinion, held entitled to sue and recover damages in like circumstances.

We refer the Court to the case of *Prout v. Starr*, 188 U. S. 537, 47 L. Ed. 584, in which it is held that the Fourteenth Amendment is superior to State immunity. In that case, which was in the federal court, it was further held that the Eleventh Amendment must be reconciled with the Fourteenth Amendment, and the Court approved an injunction suit against certain State officers as individuals as being an appropriate method in that case. If such method was ever open to the petitioner, the Supreme Court of Missouri saw fit to block that method through the aforesaid *Skrainka* case, which in a constitutional manner granted the clear right to file an action for whatever damages may have been sustained. Therefore, especially in

view of the *Skrainka* case, the denial by the Supreme Court of Missouri of access by the petitioner to the Missouri courts to recover its damages constitutes a violation of the equal protection of the laws, and state sovereignty cannot be interposed to effectuate a violation of the Fourteenth Amendment.

We refer the Court also to the case of *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 55 L. Ed. 890, which was an action for damages against a State Agricultural College which, like the State Highway Commission of Missouri, had the right to "sue and be sued," and it was contended that action by the college in building certain dikes under the authority of an act of the Legislature had resulted in serious damage to the plaintiff's property. This Court stated:

> "If the State had in so many words granted the college authority to take **or damage** the plaintiff's property for its corporate advantage without compensation, **the Constitution would have substituted liability for the attempted exemption.** But the State of South Carolina passed no such act, and attempted to grant no such immunity from suit as is claimed by the College. On the contrary, the statute created an entity, a corporation, a juristic person, whose right to hold and use property was coupled with the provision that it might sue and be sued, plead and be impleaded, in its corporate name." (Emphasis ours.)

This seems to be a clear holding that where, as in the present case, the act resulting in damage to property is lawful, then there cannot, constitutionally, be immunity from a suit for damages.

III. **The opinion and decree of the Supreme Court of Missouri deprives the petitioner of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.**

We have no additional argument to make under this point. It is raised because due process and equal protection are so closely allied that there have been some decisions, such, for example, as *Buchanan v. Warley,* 245 U. S. 60, 62 L. Ed. 149, and followed in a memorandum opinion in *Harmon v. Tyler,* 273 U. S. 668, 71 L. Ed. 831, holding that segregation of negroes violates due process, which might, perhaps, be considered as rather involving equal protection. It is possible that this Court might consider that the opinion of the Supreme Court of Missouri violated due process rather than equal protection.

CONCLUSION.

We submit that the opinion of the Supreme Court of Missouri, for the reasons heretofore given, denies equal protection of the laws, or, if we are not correct in this, that it denies due process of law to the petitioner. We further submit that the decision is in conflict with the principles announced in the decisions of this Court heretofore referred to, and that a question of great public importance is involved for the reasons stated in the foregoing petition, and that therefore a writ of certiorari should issue as prayed for therein.

Respectfully submitted,

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(18)

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IN THE

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OCTOBER TERM, 1941.

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vs.
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NO. 146.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

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Service of the within Brief in Opposition this day of July, 1941, is hereby acknowledged by counsel for the adverse party.

Attorneys for Petitioner.

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RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Supreme Court of Missouri (R. 293) is reported in 148 S. W. (2d) 499. It has not yet been officially reported.

JURISDICTIONAL GROUNDS.

The grounds on which Petitioner seeks to invoke the jurisdiction of this Court seem to be its contention that (1) this is a case arising under the "due process" or under the "equal protection" clauses of the Fourteenth Amendment of the United States Constitution (within the meaning of *Article III, Section 2, United States Constitution*), and (2) comes within this Court's appellate jurisdiction under the regulations made by Congress in *Title 28, U. S. C. A., Section 344, (b)*, authorizing certiorari for review of a final judgment by the highest court of a State where any title, right, privilege or immunity is specially set up or claimed by either party under the United States Constitution.

STATEMENT OF THE CASE.

The Supreme Court of Missouri (the court of last resort in Missouri) has held that the Petitioner has no right of recovery against the Respondent because of the construction in front of Petitioner's land of a viaduct on a state highway to eliminate a railroad grade crossing outside any municipal corporation.

The Respondent, State Highway Commission of Missouri, was created by a special law at an especially called meeting of the Missouri General Assembly in 1921.[1] It is not a corporation.[2] The Supreme Court of Missouri says the State Highway Commission of Missouri is "a subordinate branch of the executive department" of the State of Missouri.[3] Title to right-of-way for state highways is not held in the name of the Respondent nor are contracts for the construction of state highways made in the name of the Respondent, but in the name of the State of Missouri.[4]

The Petitioner is a Missouri corporation (R. 4-5, 40).

The Petitioner owns 26 acres of land in St. Louis County, Missouri (R. 5, 22). Immediately south of Petitioner's land is State Highway Route U. S. 61. Immediately east of Petitioner's land lie the Wabash railroad tracks. These tracks are used for main line and switching purposes by the Wabash and by the Terminal Railroad Association of St. Louis. Several switch tracks come inside of Petitioner's property from the northeast corner (R. 22, 23, 44, 288, 289). The Petitioner conducts a planing mill and retail and wholesale lumberyard on the land (R. 22, 28).

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[1]Laws of Missouri, First Extra Session, 1921, pp. 131 to 167, inclusive, approved by the Governor August 4, 1921, Chap. 46, Art. 13, (Secs. 8740-8787), R. S. Mo. 1939.

[2]Art. IV, Sec. 53, par. 25 of the *Missouri Constitution* provides: "The General Assembly shall not pass any local or special law: * * * (25) creating corporations, or amending, renewing, extending or explaining the charter thereof."

[3]*Bush v. State Highway Commission of Missouri*, 329 Mo. 843, 853-855, 46 S. W. (2d) 854 (1932).

[4]Sections 8759 and 8767, R. S. Mo. 1939.

The Missouri Public Service Commission of Missouri exclusively exercises the police powers of the State with reference to all crossings of public highways and railroads.[5] On June 7, 1934, the Public Service Commission of Missouri found:

> "A study of the facts indicates that a crossing at grade has become too hazardous to be permitted to continue to exist, and that a viaduct that will carry highway traffic over the tracks will provide a safe, adequate and convenient means of crossing"

and ordered a viaduct built to carry state highway traffic over the railroad tracks (R. 289, 290, 196). The viaduct was constructed in 1935 as ordered (R. 75, 76).

The public highway upon which the viaduct was built was originally opened in 1870 as a county road 100 feet wide upon a petition to the county court by the landowners in the community (R. 277-283, 154, 155) and was still 100 feet wide at the time of the trial (R. 52). The Petitioner has a frontage of 1100 feet on this highway, sometimes called Page Avenue or Boulevard. The viaduct was constructed in front of only the east 446½ or 475 feet of this 1100-foot frontage, and leaves 653½ or 625 feet of Petitioner's frontage west of the viaduct (R. 184, 181, 42).

The viaduct does not occupy the full width of the highway even for this distance of some 450 feet. Of the 100-foot highway, the roadway of the viaduct occupies only 42 feet in the clear in the middle of the highway. Between the viaduct and the right-of-way or property lines there is left approximately 25 feet of highway on each side of the viaduct for use at the old level of the road. In this 25

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[5]Section 5627 R. S. Mo. 1939 provides: "The (Public Service) Commission shall have the exclusive power to determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, apportionment of expenses, use and protection of * * * each crossing of a public road or highway by a railroad * * * and to alter or abolish any such crossing, and to require, where, in its judgment, it would be practical, a separation of grades at any such crossing heretofore or hereafter established." *Chicago, R. I. & P. Ry. Co. v. State Highway Commission of Missouri*, 322 Mo. 419, 17 S. W. (2d) 535 (1929); *State ex rel. Kansas City Terminal Ry. Co. v. Public Service Commission*, 308 Mo. 359, 378, 272 S. W. 957 (en banc 1925); *City of Kirksville v. Hines*, 285 Mo. 233, 239, 225 S. W. 950 (1920); *State ex rel. Wabash Ry. Co. v. Public Service Commission*, 306 Mo. 149, 175, 267 S. W. 102 (1924).

feet on each side (starting at the property lines and going toward the viaduct) is a 5-foot sidewalk, a 2-foot grass plot, a 15-foot paved roadway and a 2-foot walkway (R. 65, 66). Besides the paved driveways at the old road level between the viaduct and the property lines, there are also paved driveways underneath the viaduct so that vehicles can go from one side of the road to the other at the old level between the abutments which support the viaduct. There were 4 entrances from Petitioner's lumberyard into the highway. Since the construction of the viaduct, Petitioner still has these same 4 entrances. The most westerly one of these is west of the viaduct. The other 3 enter that portion of the highway in the middle of which the viaduct is constructed. At the time of the construction of the viaduct, the curb next to Petitioner's property was opened up and entrances paved up to the property line at each of the old entrances. Each of the new entrances there is now "more of a flare or wider than it was before the viaduct was built" (R. 66, 67, 60, 63, 34).

The Petitioner claimed at the trial that the construction of the viaduct depreciated the value of its property $100,000 (R. 74, 87). The jury returned a verdict of $42,500 (R. 13). The trial court granted a new trial on the ground that it should have sustained a demurrer to the evidence (R. 272, 269). The Supreme Court of Missouri sustained the action of the trial court in granting the new trial.

There are no statutes in Missouri providing for payment of compensation to abutting landowners for change of grade outside municipal corporations, and the opinion of the Missouri court in our case holds there is no recovery in the absence of statute. There are statutes applying to cities of the various classifications providing for payment of compensation for change of grade inside municipalities (R. 296). The Petitioner contends that this is an unreasonable discrimination in contravention of the "equal protection" clause of the Fourteenth Amendment of the United States Constitution.

SUMMARY OF ARGUMENT.

There can be no federal question before this Court as to whether the State of Missouri has waived its immunity to suit for damages by a citizen under the provisions in the road law that the State Highway Commission of Missouri may "sue and be sued", or by the provision of Article II, Section 21, of the Missouri Constitution "that private property shall not be taken or damaged for public use without just compensation." This is a question of local State law, as to which the decision of the State Supreme Court is controlling. There can be no denial by the State of Missouri to any person within its jurisdiction of the "equal protection of the laws" if the State refuses, as to all alike, to waive immunity to suit for damages against itself or against the Respondent, which is the "subordinate branch of the executive department" of the State of Missouri.

There can be no federal jurisdiction in this Court to, and it should not, determine that Article II, Section 21 of the Missouri Constitution created new rights, duties and obligations in substantive law (as contrasted with remedies in adjective law), or to construe the Missouri Constitution as purporting to create private property or legal rights where none existed before, so as to make it possible to "take" or "damage" what had not previously existed. It is for the State court in cases such as this to define rights in land located within the State. The "or damaged" provision in the Missouri Constitution created no new substantive rights, duties and obligations. Such substantive rights, duties, or property would have to be created by statute or have already existed in common law before they could be "damaged." Missouri has created such substantive rights by statutes and city charters in, but only in, municipal corporations.

Even if Missouri courts had departed from some former well established rule of law (which they have not) holding that the "or damaged" phrase, added to the Missouri Constitution in 1875, created new kinds of private property and legal rights in substantive law, still this would not be a

violation of the Fourteenth Amendment of the United States Constitution. Petitioner would have no property right to have such former interpretation of the Missouri law continued.

The decision of the Missouri court is final and conclusive, even against the federal courts, as to what are, or are not, substantive property rights within the boundaries of the State of Missouri. There is no appeal from its decision that an abutting landowner outside of a municipal corporation has no easement in the highway—has no property or legal right—to have it maintained at its existing grade and that any damage consequent upon a change of grade is not a legal injury, but is *damnum absque injuria.*

There can be no violation of the "due process" clause of the Fourteenth Amendment of the United States Constitution, since it would be impossible for the State of Missouri to have deprived any person of property (which the State court has held does not exist) without due process of law.

There is no violation of the "equal protection" clause of the Fourteenth Amendment of the United States Constitution if discrimination between persons or territories is based upon classifications which are not necessarily, actually and palpably unreasonable and arbitrary, or have no fair and substantial relation to the object of the legislation. That classifications are unreasonable and arbitrary is never presumed. All doubts should be resolved in favor of, and not against, legislation. The burden of proving unreasonableness and arbitrariness is on the Petitioner.

The federal courts do not have as great familiarity with local conditions and needs as does either the State court or the State Legislature and, therefore, should be, and is, reluctant to overthrow the judgment of a State court that a classification has a fair and substantial relation to the object of the legislation. Once it is determined that a difference exists between territories or persons in the different classes, then it is exclusively a legislative function to determine the proper rules for the classification, and the judicial branch of the government has no right to set up its judgment as superior to that of the legislative branch.

This Court can easily and reasonably conceive of a state of local facts which may exist in Missouri as to differences between property inside and outside municipal corporations and which would have a fair and substantial relation to whether or not easements should be granted to abutting property owners to have an existing grade maintained. The Missouri Legislature, understanding and correctly appreciating the needs of its people, will be presumed to have drawn the classification between land in and land outside of municipalities because of local problems and conditions in Missouri, made manifest by experience, so that its discrimination is based upon adequate grounds.

RELEVANT PARTS OF THE CONSTITUTION.

The relevant parts of the *Fourteenth Amendment of the United States Constitution* are:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction an equal protection of the laws."

The relevant parts of Article II, Section 21 of the *Missouri Constitution* are:

> "That private property shall not be taken or damaged for public use without just compensation."

ARGUMENT.

This Court does not have general review jurisdiction of all matters of law which were before the trial court. This Court will review the action of the trial court or of the Supreme Court of Missouri only as to **federal** questions* which may be involved in the case. By bearing this in mind, we can eliminate many issues which the Petitioner seems to raise.

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*The ground for appeal is that some title, right, privilege, or immunity is claimed under the United States Constitution, Title 28, U. S. C. A. § 344, (b).

There can be no federal question before this Court as to whether the State of Missouri has waived immunity to suit for damages by a citizen under the provisions in the road law that the State Highway Commission of Missouri may "sue and be sued"† or by the provision of Art. II, Sec. 21 of the Missouri Constitution "that private property shall not be taken or damaged for public use without just compensation."

It has never been doubted since the days of Federalist Papers and the debates in Virginia and the other colonies over the adoption of the Constitution of the United States that a citizen cannot sue the State (without its consent) to recover money. Only the State's conscience can compel it to hear the petitions of its citizens for compensation. There is no provision in the Constitution of the United States for the enforcement of a money judgment against a State (war being the only way).[1] In *Palmer v. State of Ohio*, 248 U. S. 32, 34, 63 L. Ed. 108, 39 S. Ct. 16 (1918), "the plaintiff in error sued the State of Ohio for damages for flooding lands by elevated spillways of a state-maintained dam. The Supreme Court of the State affirmed the action of the lower court in dismissing the petition on the ground that the State had not consented to be sued." This Court said, l. c. 34:

> "The right of individuals to sue a state, in either a federal or a state court, cannot be derived from the Constitution or laws of the United States. It can come only from the consent of the State. (Citing cases). Whether Ohio gave the required consent must be determined by the construction to be given to the constitutional amendment quoted, and this is a question of local state law, as to which the decision of the state supreme court is controlling with this court, no federal right being involved."

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†Sec. 8750, R. S. Mo. 1939.

[1]*Hans v. Louisiana*, 134 U. S. 1, 13-15, 33 L. Ed. 842, 10 S. Ct. 504 (1889); *Ex Parte State of N. Y.*, 256 U. S. 490, 497, 65 L. Ed. 1057, 41 S. Ct. 588 (1921); *Monoco v. Mississippi*, 292 U. S. 313, 78 L. Ed. 1282, 54 S. Ct. 745 (1934).

There can be no denial by the State of Missouri to any person within its jurisdiction of the equal protection of the laws if the State refuses, **as to all alike,** to waive immunity to suit for damages against itself or against the State Highway Commission of Missouri, the "subordinate branch of the executive department" of the State of Missouri.[2] Whether or not the State has waived immunity to suit by provisions that the State Highway Commission "may sue and be sued"[3] or by the provisions in the Missouri Constitution "that private property shall not be taken or damaged for public use without just compensation"[4] is (in the language of the *Palmer* case) "a question of local state law, as to which the decision of the State Supreme Court is controlling with this court."

> **There can be no federal jurisdiction in this Court to, and it should not, determine that Article II, Section 21 of the Missouri Constitution created new rights, duties and obligations in substantive law (as contrasted with remedies in adjective law) or to construe the Missouri Constitution as purporting to create private property or legal rights where none existed before, so as to make it possible to "take" or "damage" what had not previously existed.**

The opinion of the Supreme Court of Missouri in this case holds (R. 299):

> "If plaintiff has sustained damages by the building of the viaduct, such damages are *damnum absque injuria*, 1 C. J. 964, Sec. 57; 1 C. J. S. (b) 1006, Sec. 15."

Laws fall into two general classifications: (1) the **substantive law,** or, as *Bouvier* says in his law dictionary, "the positive law of duties and rights," and (2) the **adjective law**—or the law of remedies and procedure. It will help us to understand what the Supreme Court of

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[2]See. p. 2, supra.
[3]Section 8750, R. S. Mo. 1939.
[4]Mo. Const., Art. II, Sec. 21, as amended in 1875.

Missouri meant to hold by referring to the citations in the opinion, where we find under *Actions*, 1 C. J. 964, Sec. 57:

> "To constitute an injury there must be a violation of some **legal** right, and there are many cases in which a person may sustain actual damage without sustaining any **legal** injury. In such cases the damage is *damnum absque injuria*—damage without injury, and no cause of action arises in favor of the party sustaining it against the party by whose act it was caused. But no damage for which a recovery is expressly authorized by statute can be deemed *damnum absque injuria*." (Emphasis ours.)

Again, we find under *Actions*, 1 C. J. S. 1006, Sec. 15, b, (1):

> "Since, as noted above in Section 15a, to sustain a cause of action there must be a legal injury, a violation of some legal right, if, as may happen in many cases, a person sustains actual damage, that is, harm or loss to his person or property, without sustaining any legal injury, that is, an act or omission which the law does not deem an injury, the damage is regarded as *damnum absque injuria*, damage without injury."

Petitioner cites (P. B. 14) *City of Chicago v. Taylor*, 125 U. S. 161, 166-168, 31 L. Ed. 638. But in that case this Court considered itself bound by, and simply followed, the State Court's interpretation of the State Constitution as laid down in *Rigney v. City of Chicago*, 102 Ill. 64, 74, 80, and in *Chicago & W. I. R. R. Co. v. Ayres*, 106 Ill., 511, 518.[5]

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[5]See *Fox River Paper Co. v. R. R. Com. of Wisconsin, and Sauer v. N. Y.*, 16, *post*. The Illinois court held in 1915 in *C. Hacker Co. v. City of Joliet*, 196 Ill. A. 415, 426 (cited under *Actions*, 1 C. J. S., *supra*.) that damages suffered by abutting property because the railroad elevated its tracks, "rise solely and only from the legitimate and proper operation of the railroads on the right-of-way adjacent to appellant's premises. There is no physical interference with the *corpus* of appellant's property. Light and air may be appreciably obstructed by the raising of the embankment as it would have been by the erection of a building on the land had it been owned by a private owner, and there may be an increase in noise and dust and confusion as there might be from a legitimate business of a private owner on adjacent premises. There may be a decrease in market value of appellant's premises because of the use that the railroad company is making of its premises. All urban properties are subject to increase and decrease in market value because of uses legitimately made by other nearby owners of their land."

Petitioner cites (P. B. 14) *Householder v. The City of Kansas*, 83 Mo. 488 (1884) as holding that the addition of the words "or damaged" in 1875 to Article II, Section 21, *Missouri Constitution* created a cause of action for damages on account of change of grade in a street in a city, while prior to that date the State court had held the damages to be *damnum absque injuria*. That the *Householder* case did not intend to hold that the amendment of the Constitution created new rights, duties and obligations in substantive law or to create private property or legal rights which had not previously existed, follows from the fact that this same Supreme Court of Missouri at the same October term, 1884, denied a recovery of damages occasioned by the taking or washing away of crops and damaging of land by the fill and bridge of a railroad, constructed for public use, and which impounded surface water—holding (despite the amendment to the Constitution in 1875) that such taking and damaging was still *damnum absque injuria* in a State having the common law (rather than civil law) rule of substantive law that surface water is the common enemy, and that the owner of higher land has no natural easement to drain surface water on lower land.[6]

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[6] *Abbott v. The K. C. St. J. & C. B. R. R. Co.*, 83 Mo. 271. *Jones v. The St. L. I. M. & S. Ry. Co.*, 84 Mo. 151, 155 (1884), says the *Abbott* case "fully approved" the doctrine in *Clark's Adm'r v. H. & St. Jo. Ry. Co.*, 36 Mo. 202, 223 (1865) that "the injury done by such embankment in causing the water to overflow the land of the adjoining proprietors, must be considered as the natural consequence of what the corporation had acquired the lawful right to do by the condemnation of the land and the assessment of damages therefor, and such damages must be taken to have been included in the compensation assessed, or it was *damnum absque injuria*." See *Moss v. The St. L. I. M. & S. Ry. Co.*, 85 Mo. 86, 89 (1884) (holding that the right to affect surface water on abutting land by opening or closing fills under the railroad tracks "is of necessity, a continuous one; for the idea is not to be tolerated that the company, having bought and paid for a right, should be denied the fullest and freest exercise thereof"); *Peel v. City of Atlanta*, 85 Ga. 138, 140 (1890) (holding that the "or damaged" phrase in the Constitution simply prevents the public from shielding itself behind its immunity to suit, but did not create any new legal duties, liabilities or obligations); *McCoy v. Plumb Bayou, etc. Dist.*, 95 Ark. 345, 352 (1910), (holding that, despite the "or damaged" provision, "where no right has been violated, there is no injury for which the law affords compensation"); *Taylor v. Chicago M. & St. P. R. R. Co.*, 85 Wash. 592, 600-602 (1915), citing *Pa. R. Co. v. Marchant*, 119 Pa. 541, affirmed 153 U. S. 380, 14 S. Ct. 894, 38 L. Ed. 751, and holding that the "or damaged" phrase "does not change or lessen the force of the doctrine of *damnum absque injuria*"; *Bush v. State Highway Commission*, 329 Mo. 843, 46 S. W. (2d) 854 (1932); *Sigler v. Inter-River Drainage Dist.*, 311 Mo. 175, 198, 208, 279 S. W. 50 (1925); *Thompson v. Chicago, M. & St. P. Ry. Co.*, 137 Mo. A. 62, 68, 119 S. W. 509 (1909); *Gaus & Sons Mfg. Co. v. St. L. K. & N. Ry. Co.*, 113 Mo. 308, 314, 317-319; *Sauer v. City of New York*, 206 U. S. 536, 544, 545, 27 S. Ct. 686, 51 L. Ed. 1176 (1906) (Quoted in the opinion below, R. 297); *Tate v. State Highway Commission*, 226 Mo. A. 1216, 49 S. W. (2d) 282 (no

In the absence of statute, the dedication or condemnation of right-of-way for public highway purposes gives the public the right to do in the roadway whatever may be found necessary to properly serve the needs of highway traffic.[7]

In *Broadwell v. City of Kansas*, 75 Mo. 213, 216 (1881), the Missouri Court quoted with approval:

> " 'The courts, by numerous decisions in most of the states, have settled the law that municipal corporations, acting under the authority conferred by the legislature, to make and repair, or to grade, level and improve streets, if they keep within the limits of the street and do not trespass upon or invade private property, and exercise reasonable care and skill in the performance of the work resolved upon, are not answerable to the adjoining owner whose lands are not actually taken, trespassed upon or invaded, for consequential damages to his premises, **unless there is a provision in the charter of the corporation, or in some statute creating the liability.**' 2 *Dillon Munic. Corp.*, Sec. 990." (Emphasis ours.)

This same authority says:[8]

> "A statutory right to compensation for the change of a grade in a street is substantially a grant to the abutting owner of an easement in the street to have it maintained at its existing grade."

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recovery for taking land on which plaintiff is a tenant at will); *Union Elevator v. K. C. Belt R. R. Co.*, 135 Mo. 353, 36 S. W. 1071, (interference with the storing of freight cars on other railroad's switch tracks); *McCulloch Co. Electric Co-Op. v. Hall*, 131 S. W. (2d) 1019, (construction of a high powered transmission line on a highway in such proximity to a telephone line as to cause great damage); *Gamble v. Pettijohn*, 116 Mo. 375, 379, (tearing up, plowing, ditching and guttering in a dedicated street); *Scott v. City of Marshall*, 110 Mo. A. 178, 183, (cutting valuable trees in a street in front of plaintiff's property.)

[7]*Sauer v. City of N. Y.*, 206 U. S. 536, 544; *Julia Building Ass'n v. The Bell Telephone Co.*, 88 Mo. 258, 268, 274 (1885); *State ex rel. State Highway Commission v. Cox*, 336 Mo. 271, 281, 282, 77 S. W. (2d) 116, 220 (1934); *St. L. K. & N. W. Ry. Co. v. Clark*, 121 Mo. 167, 196-197, 25 S. W. 192 (1894); *Moss v. The St. L. I. M. & S. Ry. Co.*, 85 Mo. 86, 89 (1884).

[8]*Dillon on Munic. Corp.*, 5th Ed., p. 1820, Sec. 1152.

The opinion of the Supreme Court of Missouri in this case points out (R. 296) that "such statutes as mentioned by *Dillon* have long existed in Missouri" creating such easements against cities of various sizes and classes.

Offsetting or balancing against increased highway demands by the public within the right-of-way, with the passage of time, are the increased demands upon, and use of the highway by the abutting landowners, which, of course, increase or inflate their damages when such increased value from the highway is withdrawn or affected. Abutting landowners have no property or other fixed rights in traffic, potential customers, are the benefits which come and go with changing currents of public travel on a public highway. The State owes no duty to the Petitioner to either send public traffic past, or to stop traffic at, its door. If, after having increased traffic past Petitioner's door, it should be liable in damages for any act, which decreases the volume of such traffic or the percentage which stop, crushing burdens would be imposed upon the public treasury to pay for such unearned increments of value.[9]

This is illustrated in our case by Petitioner's claim that the little country mud road which the abutting owners opened through their farms in 1870 has, by 1935, created such an increment of value to lucky landowners abutting it that some decrease in advertising value, attractiveness to retail customers traveling the highway, and inconvenience to over length trucks in turning into the stream of traffic on the highway had decreased the value of 26 acres over $100,000—probably many times the total value of the 26

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[9]*Nelson v. State Highway Board*, 1 Atl. (2) 689, 118 A. L. R. 915 (Vt. 1938); *Sears v. Crocker*, 184 Mass. 586, 587 (1904); *Handlan v. McManus*, 42 Mo. A. 551, 556, 558 (1890), (no easement to lateral support of buildings and added weight on land by user); *McGrath v. City of St. Louis*, 215 Mo. 191, 210 (1908), (no more easement to lateral support of buildings against a public alley than against private land). A case on all fours with ours is *Grande v. Casson*, 50 Ariz. 397, 403, 72 P. (2d) 676 (1937), where it says that in a previous case (*In Re Forsstrom*) "we also held that, in the absence of a statute to the contrary, after a street had once been established, the public authorities had a right to change the grade without paying additional compensation to a property owner for an invasion of his right of access through the subsequent regrading." In that case the change of grade was in front of lots abutting on 16th Street Extension to the City of Douglas, Arizona, but outside of the corporate limits.

acres in 1870. It seems that in 65 years the tail has grown large enough to wag the dog.

Even if the Missouri courts had departed from a former well-established rule of law (which they have not) holding that the "or damaged" phrase added to the Missouri Constitution created new kinds of private property and legal rights in substantive law, still this would not be a violation of the Fourteenth Amendment of the United States Constitution. Petitioner would have no property right in such former interpretations of the Missouri law.

In *Patterson v. Colorado*, 205 U. S. 454, 461, 51 L. Ed. 897, 27 S. Ct. 556 (1907), this court said:

> "There is no constitutional right to have all general propositions of law once adopted remain unchanged. Even if it be true, as the plaintiff in error says, that the Supreme Court of Colorado departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the United States is not infringed. * * * But in general the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because it is wrong or because earlier decisions are reversed."

Again in *Brinkerhoff-Faris Trust and Savings Company v. Hill*, 281 U. S. 673, 680, 681, 50 S. Ct. 451, 74 L. Ed. 1107 (1930), where the Supreme Court of Missouri had said that it was "preposterous" and "unthinkable" that the Missouri Tax Commission had power to hear a matter and that any statute attempting to confer such power would be contrary to the Missouri Constitution (l. c. 676) yet six years later had denied the plaintiff injunctive relief on the ground that it had an adequate remedy through a hearing of the matter before the Tax Commission, this Court said that, while there was a denial of due process

because there had never been a time under the Missouri procedure when plaintiff could have had a hearing, yet

> "It is true that the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; that this Court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court. * * * Undoubtedly, the state court has the power to construe the statute dealing with the State Tax Commission; and to reexamine and overrule the *Laclede* case. Neither of these matters raises a federal question; neither is subject to our review."[10]

When the court of last resort in Missouri, whose judgment is final and conclusive, even against the federal courts, as to what are, or are not, substantive property rights within the boundaries of the State, holds that an abutting landowner outside of a municipal corporation has no easement in the highway—has no property or legal right—to have it maintained at its existing grade and that any damage consequent upon a change of grade is not a legal injury but is *damnum absque injuria*, there can be no violation of the "due process" clause of the Fourteenth Amendment of the United States Constitution, since it would then be impossible for the State to have deprived any person of property (which the court has held does not exist) without due process of law.

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[10]See to this same effect *Tidal Oil Co. v. Flanigan*, 263 U. S. 444, 450, 68 L. Ed. 382, 44 S. Ct. 197 (1923); and *Fleming v. Fleming*, 264 U. S. 29, 31, 68 L. Ed. 528, 44 S. Ct. 179 (1924).

To the above effect is *Fox River Paper Co. v. R. R. Commission of Wisconsin*, 274 U. S. 651, 654, 657, 47 S. Ct. 669, 71 L. Ed. 1279 (1927), where this court said:

> "We are not concerned with the correctness of the rule adopted by the state court, its conformity to authority, or its consistency with related legal doctrine. *Sauer v. N. Y., supra.* It is for the state court, in cases such as this to define rights in land located within the state, and the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be non-existent."

In the *Sauer* case[1] there was no statute called to the court's attention which would create any legal right o duty which had not existed at common law. This cour said:

> "But, as has been said, we are not concerne primarily with the correctness of the rule adopted b the Court of Appeals of New York and its conformit with authority. This court does not hold the relatio to the controversy between these parties which th Court of Appeals of New York had. It was the dut of that court to ascertain, declare and apply the la of New York, and its determination of that law conclusive upon this court. * * *
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> "Has the plaintiff been deprived of his propert without due process of law? The viaduct did n invade the plaintiff's land. It was entirely outsi that land. But it is said that appurtenant to the lar there were easements of access, light and air, and th the construction and operation of the viaduct impair these easements to such an extent as to constitute taking of them. The only question which need he be decided is whether the plaintiff had, as appurtena

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[1]*Sauer v. City of N. Y.*, 206 U. S. 536, 542, 545, 547, 51 L. Ed. 1176, 27 S. 686 (1906).

to his land, easements of the kind described; in other words, whether the property which the plaintiff alleged was taken existed at all. The court below has decided that the plaintiff had no such easements; in other words, that there was no property taken. It is clear that, under the law of New York, an owner of land abutting on the street has easements of access, light and air as against the erection of an elevated roadway by or for a private corporation for its own exclusive purposes, but that he has no such easements as against the public use of the streets or any structures which may be erected upon the street to subserve and promote that public use. The same law which declares the easements defines, qualifies and limits them. Surely such questions must be for the final determination of the state court. It has authority to declare that the abutting landowner has no easement of any kind over the abutting street; it may determine that he has a limited easement; or it may determine that he has an absolute and unqualified easement."

There is no violation of the "equal protection" clause of the Fourteenth Amendment of the United States Constitution if discrimination between persons or territories is based upon classifications which are not necessarily, actually and palpably unreasonable and arbitrary or have no fair and substantial relation to the object of the legislation.

It was long ago decided that the guarantee of equal protection of the laws does not require territorial uniformity.[2]

This court in *Mallett v. North Carolina*, 181 U. S. 589, 598, 45 L. Ed. 1015, 21 S. Ct. 730 (1901), quoted with approval from *Missouri v. Lewis*, 101 U. S. 22, 31, 25 L. Ed. 589 (1879), as to the "equal protection" clause:

"It means that no person or class of persons shall be denied the same protection of the laws which is

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[2]*Ocampo v. U. S.*, 234 U. S. 91, 98, 58 L. Ed. 1231, 34 S. Ct. 712 (1914); *Hays v. Missouri*, 120 U. S. 68, 71-72, 30 L. Ed. 578, 7 S. Ct. 350, (1886).

enjoyed by other persons or other classes in the same place and under like circumstances. The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. * * * If diversities of laws and of judicial proceedings may exist in the several States without violating the equality clause of the Fourteenth Amendment, there is no solid reason why there may not be such diversity in different parts of the same State. A uniformity which is not essential as regards different States cannot be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provision."

That classifications are unreasonable and arbitrary is never presumed. All doubts are resolved in favor of, and not against, legislation. The burden of proving unreasonableness and arbitrariness is on the Petitioner.

Hughes, C. J., said for this Court in *Corporation Commission of Oklahoma v. Lowe*, 281 U. S. 431, 438, 74 L. Ed. 945, 50 S. Ct. 397, 399 (1930):

"It was encumbent upon the appellee in invoking the protection of the Fourteenth Amendment to show with convincing clarity that the law of the State created against him the discrimination of which he complained. An infraction of the constitutional provision is not to be assumed. On the contrary, it is to be presumed that the State in enforcing its local policies will conform its requirements to the Federal guarantees. Doubts on this point are to be resolved in favor of, and not against, the State."

In *Borden's Farm Products Corporation v. Baldwin*, 293 U. S. 194, 209, 79 L. Ed. 281, 55 S. Ct. 187, 192 (1934), this court said through Hughes, C. J.:

"When the classification made by the legislature is called in question, if any state of facts reasonably can

be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary."

In *Fort Smith Light & Traction Co. v. Board of Improvement*, 274 U. S. 387, 391, 392, 71 L. Ed. 1112, 47 S. Ct. 595 (1927), this Court said through Justice Stone:

"The Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state. * * * Differences in location, use and physical character of streets, the extent to which paving has been completed and local methods of assessing benefits for street paving, or some of the considerations which might reasonably move the Legislature to require street paving of one (rail) road or several and not of others. * * * We may not assume in the absence of proof that such differences do not exist."

This court said in *New York Rapid Transit Corp. v. City of New York*, 303 U. S. 573, 578, 58 S. Ct. 721, 724, 82 L. Ed. 1024 (1938) through Justice Reed:

"No question is or could be made by the Corporation as to the right of a state, or a municipality with properly delegated powers, to enact laws or ordinances, based on reasonable classification of the objects of the legislation or of the persons whom it affects. 'Equal protection' does not prohibit this. Although the wide discretion as to classification retained by a legislature, often results in narrow distinctions, these distinctions, if reasonably related to the object of the legislation, are sufficient to justify the classification. * * * Indeed, it has long been the law under the 14th Amendment that 'a distinction in legislation is not arbitrary,

if any state of facts reasonably can be conceived that would sustain it' * * * 'The rule of equality permits many practical inequalities'."

The Federal Courts do not have as great familiarity with local conditions, customs and needs as does either the State Court or the State Legislature and therefore should be, and is, reluctant to overrule the judgment of a State Court that a classification has a fair and substantial relationship to the object of the legislation. Once it is determined that a difference exists between territories or persons in the different classes, then it is exclusively a legislative function to determine the proper rules for the classification and the Judicial Branch of the Government has no right to set up its judgment as superior to that of the Legislative.

In passing on a workmen's compensation law which contained close distinctions as to its applicability to different persons, this Court in *Ward & Gaw v. Krinsky*, 259 U. S. 503, 521, 522, 66 L. Ed. 1033, 42 S. Ct. 529, 28 A. L. R. 1207, 1217 (1922), approved

> "the wisdom of the familiar rule, expressed by this court in a recent case in these terms: 'There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds.' * * * What was it they were aiming at, and how did they seek to accomplish it? We need not be sure of hitting upon a correct, much less a complete, explanation. Upon the general presumption referred to the questioned group must stand, unless it were demonstrated to a moral certainty, beyond a reasonable doubt, that the grouping could not possibly be explained on reasonable grounds."[3]

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[3]See *Welch v. Swasey*, 214 U. S. 91, 105-108, 53 L. Ed. 923, 29 S. Ct. 567 (1909), (classification as to allowable heights of buildings in cities in Massachusetts); *Ohio ex rel. Clark v. Deckebach, Auditor*, 274 U. S. 392, 397, 71 L. Ed. 1115, 47 S. Ct. 630 (1927), (allowing pool hall licenses to be issued to citizens but not to aliens); *Erb. v.*

This Court can easily and reasonably conceive of a state of local facts which may exist in Missouri as to differences between property inside or outside municipal corporations, and which would have a fair and substantial relation to whether or not easements should be granted to abutting property owners to have an existing grade maintained. The Missouri Legislature, understanding and correctly appreciating the needs of its people, will be presumed to have drawn the classification between land in and land outside of municipalities because of local problems and conditions in Missouri made manifest by experience so that its discrimination is based upon adequate grounds.

The Missouri Court cites *Moxley v. Pike County*, 276 Mo. 449, 454, 208 S. W. 246, 247 (1918), in *Zoll v. County of St. Louis*, 343 Mo. 1031, 1039, 124 S. W. (2d) 1168 (1939), in connection with the proposition that:

> "Such a cause as here (a change of grade outside a municipal corporation) has never been permitted to be maintained in this State. The long established policy of the State, as reflected in the cases we have reviewed, and there are others, clearly is against the maintenance of such suits. Cases involving municipal corporations are not authority for the maintenance of the present cause, and this because when improving streets, etc., the municipality is acting in a private and proprietary capacity and for its own private benefit."

The *Moxley* case is again cited as authority for the opinion in our case (R. 298). The opinion in the *Moxley* case dealt with the question of whether agencies such as counties, townships and school districts have the same immunity from common law negligence that the State itself has, or whether they are subject to such liability (in the

Morash, 177 U. S. 584, 586, 587, 44 L. Ed. 897, 20 S. Ct. 819 (1900), (given the possibility of a difference in conditions along streets in Kansas City, Kansas, it was not for witnesses, juries or courts, but for the legislative power to determine what regulations should be applied and the propriety of limiting the speed of all trains of cars except the Interstate Rapid Transit Company's cars to 6 miles an hour, and in the absence of knowledge of local facts, the court was compelled to presume that the classification was reasonable.

instant case) as municipal corporations would be. The opinion says:

> "To make this question plain, we should look to the foundation of the distinction in the character of the two classes of public agencies which controls their liability. * * * In the organization of counties the legislative purpose is to divide the State into convenient districts for the purpose of administering the laws * * *. On the other hand, * * * the foundation of the distinction against municipal corporations is laid wide and deep in private interests which mark the first step in their creation. It consists, in this State, of filing a plat. Some proprietor, ambitious for the gains that come from a system of streets, alleys and other urban improvements which attend the creation of a city, lays it out according to his own idea, and trusts the future for that development which he hopes will immeasurably increase the value of every lot and plat of ground which it includes. Purchasers come who partake of his hope, and join him in a system of development of streets, public squares, and limited building districts, which are the principal elements of the expected profit. The State provides a plan by which the pride and ambitions of the inhabitants of the surrounding country may be utilized for the benefit of the urban corporations, (Chap. 102, Art. VI, R. S. 1909) and the fullest authority is given the corporation to control all improvements for the best interest of the inhabitants and other owners of urban property. These and other similar conditions affect the development of municipal corporations, and afford ample ground for the distinction which exists in this State between them and other governmental agencies with respect to their liability for the negligence of their officers and agents in the construction and maintenance of a class of improvements upon which their development and the peculiar value of their immovable property stands."[4]

[4]See *Municipal Corporations*, 43 C. J. 70, Sec. 6; p. 183, Sec. 180; *Municipal Corporations*, 19 R. C. L. 698, Sec. 9; p. 1111, Sec. 392; *Barree v. Cape Girardeau*, 19 Mo. 382, 388, 389 (1906); *Boothe v. Fulton*, 85 Mo. A. 16, 18-19.

The force of the distinction drawn in the *Moxley* case is evident to everyone. At the time when universal distinctions in the law were growing up between city streets and country roads, farmers and back woodsmen trudged the country mud roads in rough clothes and boots or rode in wagons. The barn for their stock was generally considered more important and was constructed more pretentiously than the farm house for the family. The relation between the grade of the yard in front of the farm house and the dirt surface of the road was considered of little importance and there would be little, if any, financial loss because of a change. On the other hand, one of the reasons for incorporating a municipal area was to secure the benefits of paved streets and sidewalks for fine ladies in silks and satins and fine gentlemen who rode in carriages. There one's place in the proper strata of society or among the "400" was supposed to be indicated, somewhat at least, by the location of his home in some restricted neighborhood, with landscaped grounds facing on an attractive street or boulevard, graded and parked. Grading, paving, and the many other conveniences which add to the pleasure of living in cities, and which are not ordinarily enjoyed outside of such incorporated areas, are generally paid for by special benefit assessments against the abutting land, on the theory that practically the only benefit from such improvement accrues to such land, and little, if any, to the general traveling public as in the country.

To promote and preserve the paramount private interest in the street, the Legislature authorized cities to establish paper grades, and to create easements in the abutting property to have those grades maintained or to recover damages if they were changed. That the establishment of a grade by a city was considered as a compact between the city and the abutting property owner, upon which the property owner might rely in making his future improvements, was indicated as early as 1821 in *Goszler v. Corporation of Georgetown*, 6 Wheat (19 U. S.) 593, 597.

In conclusion, Respondent respectfully submits: (1) that the only question before this Court is whether or not

it is a denial of the "equal protection of the laws" for the State of Missouri to adopt a local policy, and to enact statutes, providing for compensation to abutting landowners for change of street grades in municipal corporations, while enacting no statutes requiring compensation for change of grade outside of such corporations; (2) that the classification of abutting property in municipal corporations differently from property outside municipal corporations, as to the granting of an easement to have a grade maintained, is reasonable, and therefore, does not contravene the "equal protection" clause of the Fourteenth Amendment; (3) that the decisions of the Missouri courts are controlling as to (a) whether or not there has been a waiver of Respondent's immunity to suit, (b) as to whether or not the "or damaged" provision in the Missouri Constitution created new property rights, duties and obligations in substantive law, and (c) whether or not property rights, duties and obligations exist in Missouri at common law or by statute; (4) that no one can be deprived "without due process of law" of property which the State court has found to be non-existent; and (5) even if the Missouri courts had departed from former well-established rules as to the existence of a right to compensation for change of grade outside municipal corporations, still this would not be a violation of any provision in the United States Constitution.

Respectfully submitted,

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(19)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 146.

HILL-BEHAN LUMBER COMPANY, a Corporation,
Petitioner,

v.

STATE HIGHWAY COMMISSION OF MISSOURI,
a Corporation,
Respondent.

PETITIONER'S REPLY BRIEF.

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v.

STATE HIGHWAY COMMISSION OF MISSOURI,
a Corporation,
Respondent.

PETITIONER'S REPLY BRIEF.

Petitioner desires to reply briefly to the points urged by respondent in opposition to petitioner's application for a writ of certiorari.

I.

As to Respondent's Point (pp. 5, 8, Respondent's Brief) That There Can Be No Federal Question Involved Where a State Court Judgment Has Denied a Landowner Compensation for the Appropriation by the State of His Property for a Public Use Upon the Ground That the State Is IMMUNE FROM SUIT.

Respondent contends that there can be no federal question before this Court as to whether the State of Missouri has **waived** its **immunity from suit** to recover compensa-

tion for the appropriation of private property for public use by a statute[1] providing that the State Highway Commission may "sue and be sued" or by a constitutional provision[2] stating "that private property shall not be taken or damaged for public use without just compensation." It is said that this is a question of local state law, as to which the decision of the Missouri Supreme Court, in holding that neither the statute nor the constitutional provision above quoted constituted a **waiver** of the State's immunity from such a suit, is controlling (Respondent's Brief pp. 5, 8). In other words, respondent asserts that in such a suit there can be no federal questions involved, such as "due process" of law and "equal protection" of the laws, where relief is denied the landowner upon the ground that the state is **immune from suit.** It is said by respondent that this is so because **immunity from suit** is a matter of local state law, as to which the decision of the Supreme Court of Missouri is conclusive.

Respondent's contention will not bear analysis. The solution of the problem, that is, whether a federal question is involved, is not **limited** (as respondent assumes) to a consideration of whether this Court is bound by the interpretation placed upon the statute and the Missouri Constitution by the Missouri Supreme Court to the effect that neither the statutory nor the constitutional provision referred to constituted a **waiver** of the State's immunity from such a suit. Obviously, the effect of the State court judgment is to deny petitioner all remedy and hence compensation for property which the State has appropriated for a public use. The issue is not **how** the aforementioned constitutional and statutory provisions should be construed, but, rather, as construed and applied by the State court, was petitioner denied "due process" of law in con-

1 R. S. of Mo. 1939, Section 8750.

2 Article II, Section 21, of Missouri Constitution.

travention of Amendment XIV, Section 1, of the Federal Constitution, providing that "nor shall any state deprive any person of life, liberty, or property, without due process of law"? In other words, is a landowner whose property has been appropriated by the State for public use without compensation denied the "due process" of law accorded to him under Amendment XIV, Section 1, of the Federal Constitution, where in a suit against the State to recover compensation a State court judgment denies his claim upon the ground that the State is **immune from suit?** The authorities answer these questions in the affirmative.

Eminent domain is the power of the state or of those to whom the power has been lawfully delegated to appropriate property for public use. United States v. Jones, 109 U. S. 513, l. c. 518, 27 L. Ed. 1015, l. c. 1017 (1883). Just compensation for property appropriated is a limitation on the use of the power. The "due process" clause of Amendment XIV, Section 1, of the Federal Constitution applies to state action (legislative or judicial), so that **states** cannot appropriate private property for public use without just compensation to the owner. Compensation is an element of "due process" of law under Amendment XIV, Section 1, of the Federal Constitution. This Court has held that a judgment of a state court whereby private property is appropriated by the state for public use, without compensation made or secured to the owner, is wanting in the "due process" of law required by the Fourteenth Amendment of the United States Constitution. In **Chicago, Burlington & Quincy Railroad Company v. City of Chicago,** 166 U. S. 226, 228, 41 L. Ed. 979, 982 (1897), this Court said, inter alia:

> "The questions presented on this writ of error relate to the jurisdiction of this court to re-examine the final judgment of the Supreme Court of Illinois, and to certain rulings of the state court which, it is alleged,

were in disregard of that part of the Fourteenth Amendment declaring that no state shall deprive any person of his property without due process of law, or deny the equal protection of the laws to any person within its jurisdiction.

* * * * * * *

"The general contentions of the railroad company are:

"That the judgment of the state court * * * whereby compensation to the extent of $1 only is awarded, deprives it of its property without due process of law, contrary to the prohibitions of the 14th Amendment. * * *

"It must be observed that the prohibitions of the Amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that Amendment against deprivation by the state 'violates the constitutional inhibition; and he acts in the name and for the state, and is clothed with the state's power; his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.'

* * * * * * *

"It is proper now to inquire whether the due process of law enjoined by the 14th Amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under authority of a state.

* * * * * * *

"The conclusion of the court on this question is, that since the adoption of the 14th Amendment compensation for private property taken for public uses constitutes an essential element in 'due process of law,' and that without such compensation the appropriation of private property to public uses, no matter

under what form of procedure it is taken, would violate the provisions of the Federal Constitution.

* * * * * * *

"In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

Under Amendment XIV, Section 1, of the Federal Constitution petitioner was and is entitled to compensation for any property belonging to it which the state has appropriated for a public use. The state has no power to destroy this **constitutional** right, whether acting through its Legislature or judiciary. Chicago, Burlington & Quincy Railroad Company v. City of Chicago, 166 U. S. 226, 41 L. Ed. 979 (1897); Panhandle Eastern Pipe Line Company v. State Highway Commission of Kansas, 294 U. S. 613, 79 L. Ed. 1090 (1935). The judgment of the Missouri Supreme Court in the above-entitled cause (148 S. W. [2d] 499) deprives petitioner of **all** remedy for the enforcement of this right. In Brinkerhoff-Faris Trust & Savings Company v. Hill, 281 U. S. 673, 74 L. Ed. 1107 (1930), this Court held that a plaintiff is denied the "due process" of law accorded to him under Amendment XIV of the Federal Constitution where a state court judgment deprives him of **all** remedy for the enforcement of a right which the state has no power to destroy. The Court said:

"While it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or

through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

In Hopkins v. Clemson College, 221 U. S. 636, 637, 55 L. Ed. 890 (1911), a landowner had brought a common-law action in a state court to recover compensation for property appropriated for a public use. The state court denied the landowner relief upon the ground that in such an action the state was **immune from suit** without its consent. This Court, in reversing the state court judgment, held that with the **exception** named in the Constitution, to wit, that no state shall deprive any person of life, liberty or property without due process of law, every state has immunity from suit. The Court said:

> "The court (state trial court) held that the defendant was a public agent, which could not be sued without the consent of the state. * * * Holding that the state was an indispensable party, and had not given its consent to be sued, the court dismissed the complaint.
>
> "On appeal * * * the twenty-third assignment of error was as follows:
>
> > "'Because the Fourteenth Amendment to the Constitution of the United States provides: "Nor shall any state deprive any person of life, liberty or property without due process of law." The allegations of the complaint show that plaintiff has been deprived of his property for all practical purposes as agricultural lands as effectually as if there had been a physical taking thereof.' * * *
>
> "The Supreme Court of the state adopted the opinion of the trial judge, and on the ground that the state was a necessary party and had not consented to be sued, dismissed the bill of complaint. 77 S. Car. 12

57 S. E. Rep. 551. Thereupon the plaintiff sued out a writ of error to this court.

* * * * * * *

"That ruling and the assignments of error thereon raise the question as to whether a public corporation can avail itself of the state's immunity from suit, in a proceeding against it for so managing the land of the state as to damage or take private property without due process of law.

"With the exception named in the Constitution, every state has absolute immunity from suit.

* * * * * * *

"An examination of the cases cited, in any respect similar to this, will show that they involve questions of liability in a suit, rather than immunity from suit.

"The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion."

On page eight (8) of respondent's brief, Palmer v. State of Ohio, 96 Ohio St. 513, 118 N. E. 102, 248 U. S. 32, 63 L. Ed. 108 (1918), is cited for the proposition that the decision of a state court that the state had not given its consent to be sued or is not suable is controlling. The case is not in point. An examination of the record in that case will show that it was not a suit (as here) against the state based upon the provisions of Amendment XIV, Section 1, of the Federal Constitution to recover compensation for property appropriated by the state for public use. On the contrary, the Palmer case was a suit against the state for **negligence**, a suit to recover damages resulting to the plaintiff from the negligent acts of the state's agents. The question raised was whether the Ohio Constitution, providing that "suits may be brought against the state," constituted consent on behalf of the state to be sued for negligence. This Court held that the construction placed upon the Ohio Constitution by the Ohio Supreme Court,

rejecting the claim that consent of the state to be sued in such an action had been given by that instrument, was controlling. Here it is not a question of whether the state has given its consent to be sued or has **waived** its immunity from suit. The question is: Did the state ever have any **immunity** to waive? It has heretofore been pointed out that a state has **no immunity** from a suit to recover damages for property appropriated by it for public use without compensation.

II.

As to Respondent's Point (Respondent's Brief pp. 5-6, 9, 15-17) That There Can Be No Appropriation or Taking of Petitioner's Property in Violation of the "Due Process" Clause of Amendment XIV of the Federal Constitution Where a State Court Judgment Has Ruled That Petitioner Has NO PROPERTY Right.

Respondent contends that petitioner has not been deprived of property in violation of the "due process" of law accorded to it under Amendment XIV, Section 1, of the Federal Constitution because petitioner had no "property" to be deprived of. And it is said that this is so for the reason that the state court has decided that Article II, Section 21, of the Missouri Constitution providing "that private property shall not be taken or damaged for public use without just compensation" did not create new property rights, duties and obligations in substantive law in favor of petitioner (an abutting landowner). Respondent asserts that said decision of the Missouri Supreme Court in the instant cause is final and conclusive on this issue (Respondent's Brief pp. 5-6, 9, 15-17).

The rule for which respondent contends, namely, that it is for the state court in cases such as this to define rights in land located within the state, has its limitations. The

Fourteenth Amendment has always required that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the basis of all our civil and political institutions and which are frequently designated as "law of the land." In final analysis it is a question of whether the judgment of the state court amounts to an arbitrary or capricious exercise of power or is it in conflict with those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254 (1921). It has been held that, where the basis upon which the state court rests its decision denying the asserted federal right has no substantial support in the record, this Court will review and correct it. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review by this Court. See Postal Telegraph-Cable Company v. City of Newport, 247 U. S. 464, 62 L. Ed. 1215 (1918). The construction of a state statute or provision of a state constitution by the highest court of the state will not be followed by this Court where, as here, it is so "unreasonable in its application to those asserting a federal right as to obstruct it." Central Union Telephone Company v. City of Edwardsville, 269 U. S. 190, l. c. 195, 70 L. Ed. 229, l. c. 232 (1925).

The adjudicated cases in this country, including those decided by the Supreme Court of Missouri, show quite clearly that the state court judgment in the instant cause construing the "or damaged" provision of Article II, Section 21, of the Missouri Constitution as not creating a property right in favor of petitioner, an abutting landowner, is **unreasonable.** It has been uniformly held that a statutory or constitutional provision providing, as here, that private property shall not be taken or "damaged"

for public use without compensation was intended to and did create a property right in favor of the abutting landowner and gives such an owner a right of recovery for consequential damages resulting from a change in grade in an adjacent street or highway.[1] And in City of Chicago v. Taylor, 125 U. S. 161, 168, 31 L. Ed. 638, 641 (1888), this Court said that the use of the word "damaged" in a state constitutional provision, such as we have here, "could have been with no other intention."

There is also no escape from the proposition that, prior to the rendition of the state court judgment sought to be reviewed in the instant cause, the Supreme Court of Missouri had given a like interpretation to the word "damaged," as employed in Article II, Section 21, of the Missouri Constitution, that is, it was intended to and did create a property right in favor of an abutting landowner regardless of whether his land was located within the territorial confines of a municipality or outside thereof, and that consequential damages resulting from a change in grade in an adjacent highway or street was recoverable. See Householder v. The City of Kansas, 83 Mo. 489 (1884); Tremayne et al. v. City of St. Louis, 320 Mo. 120, 6 S. W. (2d) 935, 937 (1928), and Johnson v. City of St. Louis, 173 Fed. 31, 36 (1909; C. C. A. 8th), wherein Justice Sanborn who wrote the opinion of the Court in that case, undertakes to review and analyze the Missouri decisions on the point under discussion.

But it is said by respondent that, even if the Supreme Court of Missouri had ruled prior to its decision in the instant case that the "or damaged" phrase added to the

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1 See Ettor v. City of Tacoma, 228 U. S. 148, 57 L. Ed. 773 (1913); Chick Springs Water Co. v. State Highway Department, 159 S. C. 481, 157 S. E. 843 (1931); Campbell v. Arkansas State Highway Commission, 183 Ark. 780, 38 S. W. (2d) 753 (1931); 20 Corpus Juris, Section 140, pp. 671-674.

Missouri Constitution in 1875 created a property right in favor of an abutting landowner, such as the petitioner, still the state court judgment sought to be reviewed herein would not be in violation of the "due process" clause of the Fourteenth Amendment of the United States Constitution, because petitioner has no property right in such former interpretations of the Missouri law and is, therefore, not entitled to have its right to compensation determined by former Missouri law (Respondent's Brief pp. 5-6, 14-15). This contention is without merit. The record shows that petitioner sustained its damages in the year 1935 (R. 75-76). Prior to the year 1935 the word "damaged," employed in Article II, Section 21, of the Missouri Constitution, had been construed by the Missouri Supreme Court in the Householder case, supra, and later cases as giving an abutting owner the right to recover compensation for damages resulting from a change in grade. The right to compensation in such a case has been held by this Court to be a **vested property right,** which is protected by the "due process" clause of the Fourteenth Amendment to the Federal Constitution from destruction by subsequent **state** action, whether denominated legislative or judicial, or both. In Ettor v. City of Tacoma, 228 U. S. 148, 157, 57 L. Ed. 773, 779 (1912), an action was brought in a state court by an abutting landowner to recover consequential damages for change in grade in an adjacent street. At the time the grading was done compensation for consequential damages due to street grading was required by statute and judicial decision. During the pendency of the suit the statute was amended and as amended the Supreme Court of the State of Washington interpreted the statute as not requiring compensation to an abutting owner for consequential damages resulting from the change in grade of a street. The landowner contended that the state court in so construing the amendatory statute had deprived him of his property without "due process" of law, in violation

of the Fourteenth Amendment of the Federal Constitution. In reversing the state court judgment, this Court said:

> "The court below gave a retrospective effect to the amendatory * * * act by holding that the effect of the repeal was to destroy the right to compensation which had accrued while the act was in force. * * *
>
> "The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated.
>
> * * * * * * *
>
> "The right to compensation was a vested property right. The judgments must be reversed * * *."

Neither the Patterson case nor the Brinkerhoff case, cited on page fourteen (14) of respondent's brief, lends any support to respondent's contention that this petitioner is not entitled to have its right to compensation determined by the Missouri law which existed prior to the decision of the Missouri Supreme Court in the instant cause. In neither of the cited cases did the state court judgment complained of divest the complaining party of a **vested property right.**

III.

As to Respondent's Point (pp. 6, 17-24) That There Can Be No Violation of the "Equal Protection" Clause of the Fourteenth Amendment, and Hence No Federal Question Is Involved, Where the Discrimination Between Persons or Territories Is Based Upon Classifications Which Are Reasonable and Have a Fair and Substantial Relation to the Object of the Legislation.

Respondent contends that in the instant cause there can be no violation of the "equal protection" clause of the Fourteenth Amendment of the United States Constitution, and therefore no federal question is involved, where the

legislative classification rests upon a reasonable basis and has a fair and substantial relation to the object of the legislation; that all doubts are resolved in favor of the legislative classification set up, that is, that persons owning land within a municipality have a right to recover damages resulting from the change in grade of an abutting street, whereas, persons owning land situated outside of the territorial confines of a city have no right to recover damages resulting from the change in grade of an adjacent highway; that the legislative classification set up is founded upon a reasonable basis and has a fair and substantial relation to the object of the legislation (Respondent's Brief pp. 17-23). Respondent's argument is fallacious. There is no legislative classification involved in this case. Respondent mentions no specific statute in which the Missouri Legislature has expressly undertaken to set up a classification of the kind and character suggested here. In Missouri there are, in a few instances (not mentioned by respondent), cases wherein a statute or a city ordinance applying to a **particular** municipality has undertaken to prescribe the procedure to be followed in securing the rights expressly accorded to every landowner under Article II, Section 21, of the Missouri Constitution. No legislative intent can be inferred from such legislation to set up a classification making a distinction between landowners in a city and landowners outside of a city on the right to recover damages in change of grade cases. It would be **contrary** to the plain language of Article II, Section 21, of the Missouri Constitution, which does not discriminate between landowners or territories. Under this article and section of the Missouri Constitution all landowners are given equal treatment regardless of where their land may be situated. The presumption exists that a legislative body does not intend to violate the Constitution, but intends to act within the scope of its lawful powers and to enact valid and effective legislation. Becker

Steel Company of America v. Cummings, Attorney-General, 296 U. S. 74, 80 L. Ed. 54 (1935); State ex rel. Anderson et al. v. Becker, 326 Mo. 1193, 34 S. W. (2d) 27 (1930).

Petitioner is complaining of judicial action, to wit, a state court judgment which makes an arbitrary distinction between landowners in a city and those who own land without the territorial confines of a city on the right to recover damages in change of grade cases (Petitioner's Brief pp. 13-17, 23). Clearly, Article II, Section 21, of the Missouri Constitution makes no such distinction. On the contrary, every landowner is to be treated alike in change of grade cases. The **Constitution** of a state, like that of the nation, is the **supreme law** within the realm and sphere of its authority. Hawke v. Smith, 253 U. S. 221, 226, 64 L. Ed. 871, 875 (1920); State v. Roach, 230 Mo. 408, 433, 130 S. W. 689 (1910). Viewed from the standpoint of legal character, a Constitution in the American sense of the term is the fundamental or basic law to which all others must conform. In the instant cause the state court judgment denies petitioner equal protection under the **supreme law** of the state. The prohibitions of the Fourteenth Amendment of the Federal Constitution, including the clause that "no state shall deny to any person within its jurisdiction the equal protection of the laws," apply to and may be violated by state action of every kind, by any agency or instrumentality, including not only legislative, but also **judicial** action. Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 83 L. Ed. 208 (1938); Chicago, Burlington & Quincy R. R. Co. v. Chicago, 166 U. S. 226, 233, 41 L. Ed. 979 (1897). Petitioner has previously shown in its original brief that the discrimination effected by the state court judgment has no reasonable basis upon which to stand. Respondent has suggested no state of existing facts or legal reason as a basis or justification for the action of the state court in setting up or creating a classification of the

type which we have here, contrary to the provisions of Article II, Section 21, of the Missouri Constitution, requiring that compensation be paid to **every landowner** whose property has been taken or damaged for public use.

It is therefore respectfully submitted this case is one calling for the issuance of a writ of certiorari to review a state court decision.

Respectfully submitted,

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